

**A Sixth District outline of  
ORIGINAL PROCEEDINGS AND RELIEF ANCILLARY TO APPEAL**

In the Sixth District, petitions for writs of mandate, prohibition, certiorari, and habeas corpus, statutory review petitions, other miscellaneous applications to the original jurisdiction of the court, applications for supersedeas or other relief pending appeal under Code of Civil Procedure section 923 or other statutory provisions, applications re bail pending appeal, and transfers of appeals from the superior court appellate departments are addressed to the court's discretion and are normally handled independently of the court's appeal caseload.

The following outline of such proceedings, updated in August 1999, has been greatly oversimplified for the sake of brevity. It addresses primarily the two most common extraordinary writs -- mandate and prohibition -- and the "great writ," habeas corpus. For comprehensive discussion see the authorities cited. The court will be glad to respond to procedural questions. Call the Clerk's Office at (408) 277-1004.

## **ORIGINAL PROCEEDINGS**

### **CHECKLIST FOR COUNSEL**

Here are questions counsel should ask themselves before filing a petition with the Sixth District:

- (a) Is this a petition for one of the statutory writs with time limits, and if so is it timely? (See WRIT TIME LIMITS below.)
- (b) If this is a Pen. Code, § 1538.5 or 999a writ petition in a felony case, was the motion made in the trial court within 60 days of the arraignment? (Penal Code, § 1510.)
- (c) Have you included a full record including at a minimum the order challenged, the pleadings pro and con leading up to the order, the transcript of the hearing if any, anything else needed to give a full understanding of what the trial court did and its reasons for doing so, and the identity of the trial judge? (Rule 56(c)) Please account for any omissions.
- (d) **SERVICE:** Be sure you include a proof of service on all interested parties. If you are asking for a temporary stay within five days after you file the petition, serve all adverse parties by hand delivery and show in your proof of service you have done so.
- (e) **SEALING:** This court has a very specific policy regarding sealing. It is not the court's normal policy to permit sealing except for limited parts of the filed papers separated from the rest, and then only for good cause shown by separate application.
- (f) **IRREPARABLE INJURY:** If this is a nonstatutory writ petition, you must justify it by showing why normal remedies are inadequate. Have you done so?
- (g) If you are applying for a nonstatutory writ, and if more than 60 days have passed since the order to be reviewed was filed, please explain the delay in filing.

- (h) PLEASE TAB YOUR EXHIBITS AND PAGINATE CONSECUTIVELY. PLEASE DO NOT BIND SUCH LARGE VOLUMES (OVER 300 PAGES) THAT THEY CANNOT BE HANDLED OR PHOTOCOPIED FROM. PLEASE DO NOT BIND THEM IN SUCH A MANNER THAT THEY WILL FALL APART.
- (i) Our policy is to ask for opposition if we want it. No affirmative relief other than emergency stays will be granted without asking for opposition. If you hear nothing, you do not need to file opposition. If you are asked, you will be given 15 days in most circumstances.
- (j) Petitions should be filed in the lowest available court. (See rule 56(a)(1).) In unified courts, start in the Superior Court if the underlying case formerly would have been filed in Municipal Court. Also, stays which the Superior Court has discretion to grant should be requested there first.
- (k) Petitions should be verified and essential facts should not be stated on information and belief. A petition is an original pleading. It is essential to support a stay request with a verified showing of need.
- (l) Time to go to the Supreme Court on a summary denial without opinion is 10 days from the date of the denial. There is no power in the Court of Appeal to reconsider a summary denial. If the writ petition is accepted for review and decided by opinion, then unless the Court of Appeal shortens time under rule 24(d), the normal time for finality -- 30 days from filing of the opinion -- will apply and the 10 days will not run until the opinion is final as to the Court of Appeal.
- (m) RELATED MATTERS: Please disclose (i) all related matters now pending in this court and (ii) any prior petitions you have filed in this court related to the same subject matter.
- (n) Procedural but NOT SUBSTANTIVE questions will be gladly answered. Phone the clerk's office at (408) 277-1004.

## **WRIT TIME LIMITS**

### **EXAMPLES OF STATUTORY TIME LIMITS**

10 days after service of notice of order	Challenge judge, Code Civ. Proc. 170.3(d) Quash service denied, Code Civ. Proc. 418.10(c)
20 days after service of notice of order	Coordination, Code Civ. Proc. 404.6 Denial summary judgment or adjudication Code Civ. Proc. 437c(l) Expunge lis pendens, Code Civ. Proc. 405.39 Good faith settlement, Code Civ. Proc. 877.6(e)
20 days after first arraignment	Unfitness, rule 1482(j)
20 days after service of notice of order	Venue, Code Civ. Proc. 400
15 days after entry of order denying motion to dismiss	Set aside, Pen. Code 995, 999a
30 days after entry of order denying suppression of evidence	Pen. Code 1538.5 (i),- (o)
<u>All pretrial criminal review:</u> Motion 45 days after arraignment on complaint if misdemeanor, 60 days after arraignment on information if felony	Pen. Code 1510

WCAB: 45 days after  
denial or disposition of  
reconsideration

Lab. Code 5950

ALRB: 30 days after issuance  
of final Board order

Lab. Code 1160.8

## **NONSTATUTORY 60-DAY RULE**

60 days after entry of order  
Nonstatutory writ petition  
(Popelka, 107 Cal.App.3d 496)

Petition for stay of unlawful  
detainer after trial court  
denies (Code Civ. Proc. 1176:  
get stay if extreme hardship  
to defendant, no irreparable  
injury to plaintiff; conditions  
including reasonable rental,  
usually at contract rate; ask  
judge who tried the unlawful  
detainer first)

Superior court denies writ  
petition in matter pending in  
municipal court (Code Civ.  
Proc. 904.1(a)(1))

## SHORT BIBLIOGRAPHY

For general discussion of original proceedings, see 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs; Cont.Ed.Bar, Cal. Civil Writ Practice (3rd ed. 1996); Cont.Ed.Bar, Appeals and Writs in Criminal Cases (1982) ch. 2, as supplemented. Read Omaha Indemnity Co. v. Superior Court (1989) 209 Cal.App.3d 1266.

## MANDATE & PROHIBITION

Review by extraordinary writ, unlike review by appeal, is within the discretion of the reviewing court, and statewide statistics suggest that writ relief will be denied nine times out of ten. Civil pleading (see Babb v. Superior Court (1971) 3 Cal.3d 841, 851) and discovery (see Oceanside Union School Dist. v. Superior Court (1962) 58 Cal.2d 180, 185-186, fn. 4) are examples of areas in which it is particularly difficult to get writ review. To succeed, a writ petition must not only meet technical requirements but also persuade the reviewing court that it should intervene. The petition should show not only that the decision below was clearly and prejudicially wrong but also that effective relief can be given by writ and is not available (at least as a practical matter) in any other way. (See, e.g., Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 128-130.) It may also be effective to show (if possible) that the petition is supported by a strong judicial policy such as the preference for trial on the merits, and that writ relief would save time and judicial resources. There are several statutory provisions for writ review, which do not bind the Court of Appeal to grant relief but may help to get the court's attention. If one of the statutes is applicable, it should be prominently cited early in the petition.

Examples:

Code Civ. Proc. § 170.3, subd. (d) (judicial disqualification for cause; re peremptory challenge under Code Civ. Proc., § 170.6 (See In re Sheila B. (1993) 19 Cal.App.4th 187)

Code Civ. Proc., § 400 (venue).

Code Civ. Proc., § 404.6 (coordination).

Code Civ. Proc., § 405.39 (lis pendens).

Code Civ. Proc., § 418.10, subd.(c) (in personam jurisdiction).

Code Civ. Proc., § 437c, subd. (L) (summary judgment).

Code Civ. Proc., § 877.6, subd. (e) (good faith settlement determination).

Code Civ. Proc., § 904.1, subd. (a)(1) (superior court judgment granting or denying a writ petition directed to a municipal court).

Code Civ. Proc., § 1176, subd. (a) (stay pending appeal in unlawful detainer).

Pen. Code, § 999a (denial of motion to set aside information, made on specified grounds).

Pen. Code, § 1538.5, subd. (i), (o) (suppression motions).

## ELEMENTS OF THE WRITS

**MANDATE** is made available primarily “to compel the performance of an act which the law specially enjoins.” (Code Civ. Proc., § 1085.) This narrow definition has been much broadened by usage, and mandate is now regularly used not only to compel performance of “ministerial acts” but also to correct “manifest abuses of discretion” by lower courts. As its name implies it is used to order the respondent to take some affirmative action, although that action may be to vacate an erroneous previous action.

**PROHIBITION** is made available to prevent judicial action which would be without or in excess of jurisdiction. (Code Civ. Proc., § 1102.) Excess of jurisdiction is defined broadly. (Cf. 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 50, pp. 827-827.) On the other hand, the lower court is said to have “power to make an incorrect decision;” therefore prohibition will not lie to prevent “mere error.” (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 287.)

It is usually not a fatal mistake to call for the wrong writ in the initial petition, so long as the petition alleges facts sufficient to show that the petitioner is prima facie entitled to one of the writs: The reviewing court can save a formally defective petition by construing it to cure the defects.

On the other hand it is good practice to get it right the first time. It is particularly advisable to ask for the right writ if the petition is based on a statute (for example, Code Civ. Proc., § 400) which expressly identifies the writ) (Note that Code Civ. Proc., § 437c, subd. (L), does not identify the writ. Ask for mandate.)



## PROCEDURAL REQUIREMENTS FOR PETITIONS

Here is a quick review of procedural requirements for writ petitions. Many specific requirements are compiled in rule 56 of the California Rules of Court; a copy of rule 56 is attached to this outline.

1. **Standing.** The petitioner must be beneficially interested in the outcome of the proceeding.

2. **Proper Court.** In general the writ petition should be filed in the lowest available court. If a higher court is selected, the petition must explain why. (Rule 56(a)(1).)

3. **Timeliness.** A writ petition should be filed promptly. While there is no firm general time limit the accepted rule is that the petition should be filed within 60 days. (See the dictum in Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal.App.3d 496, 499.) There are specific time limits in most of the express statutory provisions for writ review listed above, and these specific limits are usually deemed jurisdictional (see, e.g., Sturm, Ruger & Co. v. Superior Court (1985) 164 Cal.App.3d 579) and are sometimes construed quite strictly (see, e.g., Eldridge v. Superior Court (1989) 208 Cal.App.3d 1350, 1355, and Schmidt v. Superior Court (1989) 207 Cal.App.3d 56, 60; but see the Sixth District's opinion in Dodge Center v. Superior Court (1988) 199 Cal.App.3d 332, 337-338). See the list of WRIT TIME LIMITS starting at page 4 of this outline, and always research the applicable code sections. Usually a statutory time runs from notice, and if notice was given only by mail the statutory extensions apply. (Cf. Code Civ. Proc., § 1013; Shearer v. Superior Court (1977) 70 Cal.App.3d 424, 428.)

4. **Form.** Generally follow the reproduction and binding rules applicable to appellate briefs. See rule 56 for rules specific to writ papers.

a. **Petition.** The petition is analogous to a civil pleading. It should state facts sufficient to warrant writ relief. There are forms in the practice texts. The petition must be verified. (Rule 56(a).) Avoid alleging essential facts "on information and belief." (Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal.App.3d 201, 204.)

b. **Points and authorities.** The petition must be accompanied by points and authorities (rule 56(b)), which are normally bound immediately following the petition. Use brief format, with index, table of cases, and so on. The points and authorities are more important than the petition: Take them seriously. If any argument made in the petition was not made below, the petitioner should justify making a new argument for the first time in the reviewing court. (See Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal.3d 362, 374-375, fn. 6.)

c. **Record.** The petitioner must provide a factual record sufficient to permit the review he or she seeks. Every practitioner should read Sherwood v. Superior Court (1979) 24 Cal.3d 183, 186-187, and Lemelle v. Superior Court (1978) 77 Cal.App.3d 148, 156-157. Include every relevant document. (Cf. rule 56(c).) The most common mistake is to omit the opposing party's trial-court papers. If the record is insufficient, the reviewing court can summarily deny the petition or at least decline to act until the petitioner has served and filed the missing documents. Mark all exhibits clearly, page-number them consecutively from the first page of the first exhibit to the last of the last, and include a list of exhibits immediately preceding the exhibits themselves. The exhibits can be bound with the petition (normally immediately following the points and authorities) or separately, but if the exhibits are long it is better to bind them separately and if they are very long you should break them into 300-page volumes.

d. **Packaging.** Writ documents should be bound in red. (Rule 44(c).) Do not use acetate or clear plastic. Bind firmly at the left margin and tape any staples or other sharp fasteners. If relief is needed immediately, or if you are requesting a stay in the petition (see rule 49.5), or if there is a related appeal pending (see rule 56(a)(3)), and in any event if there is a trial date, note these facts prominently on the front cover of the petition, and advise the court clerk if the petition is urgent when the brief is filed.

Prepare an original and four copies of the petition and anything bound with it (and one copy of all separately-bound exhibits) for the court, copies of everything (including all exhibits) for all parties who are to be served, and any file and comeback copies you need. Be sure to include with your originals, proof of service on all interested parties including the respondent court (rule 56(b)). If you serve attorneys, indicate their state bar numbers, and show their clients' name on the proof of service. If you are asking for a temporary stay within five days after you file the petition, serve all adverse parties by hand delivery and show in your proof of service that you have done so.

5. **Filing and fees.** All documents to be filed in the Sixth District should be sent or delivered to the Office of the Clerk of the Court, 333 West Santa Clara Street, Room 1060, San Jose, CA 95113. There is no provision in the rules for filing by FAX or other forms of electronic transmission. Your documents will not be accepted for filing unless they comply with the California Rules of Court and (in civil matters) are accompanied by either a \$265 filing fee or a Sixth District order waiving the fee. If you need a fee waiver, apply for it well in advance so that your petition can meet any applicable filing deadlines.

6. **Repeat applications.** The general rule is that an extraordinary writ petition previously filed and denied in the same or a lower court will not be entertained a second time. (Cf. Hagen v. Superior Court (1962) 57 Cal.2d 767, 769-771.) There are exceptions, both by statute (cf. Code Civ. Proc., § 904.1, subd. (a)(1)) and within the reviewing court's discretion.

## PROCESSING THE WRIT PETITION

1. **Opposition.** Rule 56(b) provides that no statement in opposition to a writ petition is required unless requested by the court, but permits any adverse party to file opposition within 5 days. The Sixth District will not grant relief (beyond a temporary stay) until opposition has been called for and (if timely submitted) considered. Usually the court's request for opposition will allow the real party in interest between 10 and 20 calendar days to respond.

2. **Preliminary order.** Upon consideration of the petition and any opposition submitted the court will normally either deny summarily or order issuance of a peremptory or alternative writ of mandate or prohibition.

a. **Summary denial** need not be accompanied by a statement of reasons or citation of authority and it is final immediately.

b. **If affirmative relief** is to be granted, the Sixth District will issue an alternative writ of mandate or prohibition, which directs the relief prayed for in the petition or, in the alternative, that the respondent appear and show cause why the relief should not be granted. The order to show cause can also be issued without the alternative.

3. **Stays.** At any stage of the proceedings on an extraordinary writ the reviewing court may issue stay orders to maintain status quo pending determination or for any other reason in the interest of justice. An application for stay order bound with the petition must be separately noted on the front cover (rule 49.5), and any application for a stay must be supported by an adequate verified showing of need.

4. **Return.** Technically a "return," in writ practice, is a document similar in form and function to the answer in civil pleadings: It admits, denies, or avoids the allegations of the petition. The return comes into play if an alternative writ or order to show cause is issued: The alternative writ or order to show cause will usually specify a return date distinct from the oral argument date, and failure to file a return (where so provided for) will enable the reviewing court to deem the factual allegations of the petition admitted but will not result in a default: The legal issues must still be heard and decided. Parties often submit additional briefing on or before the return date: It is considered good practice to accompany the return with a thorough brief on the merits.

5. **Oral argument** may be requested by the court. If the court calls for argument - by alternative writ or order to show cause (cf. Bay Development, Ltd. v. Superior Court (1990) 50 Cal.3d 1012, 1025, fn. 8) or possibly by direct order for argument or even a

simple letter to the parties -- by all means argue. The usual rules and procedures for oral argument, and the usual tactical considerations, apply.

6. **Submission and decision.** The writ proceeding will stand submitted at completion, or upon waiver, of oral argument unless the court otherwise directs. The 90-day rule applies. Once an alternative writ has issued, usually if oral argument has been scheduled by any means, and in any event if affirmative relief (other than a temporary stay) is granted, the court must file an opinion “in writing with reasons stated.” (Cal. Const., art. VI, § 14.)

7. **Further review.** Upon summary denial the writ proceeding is no longer before the Court of Appeal and any further review must be sought by timely petition for review in the Supreme Court. Other dispositions are governed by the same rehearing and review rules and time periods applicable to appeals, unless (under rule 24(d)) the Court of Appeal orders that a decision granting a peremptory writ will be final immediately or within less than the usual 30-day period.

## HABEAS CORPUS

Habeas Corpus is called the “great writ”. Its statutory purpose is to inquire into the lawfulness of a person’s imprisonment or restraint of his or her liberty (Pen. Code, § 1473) but its use has been expanded to deal with any of various issues somehow related to actual or constructive custody. It has been repeatedly held that habeas jurisdiction may persist even after custody has terminated. (See In re William M. (1970) 3 Cal.3d 16, 23-25.) Thus in an appropriate case habeas may be used to obtain what amounts to declaratory relief notwithstanding technical mootness. Habeas has the special property of permitting a new factual inquiry into the issues, often by evidentiary hearing.

It is often said that habeas will not lie to correct ordinary error, or to review matters which could have been dealt with by timely appeal. (In re Lindley (1947) 29 Cal.2d 709, 722-723; In re Dixon (1953) 41 Cal.2d 756, 759.) The best case for habeas is one which persuasively alleges a “fundamental” jurisdictional error or denial of a “fundamental” right. Read In re Clark (1993) 5 Cal.4th 750; In re Harris (1993) 5 Cal.4th 813; People v. Duvall (1995) 9 Cal.4th 464.

## PROCEDURAL REQUIREMENTS FOR PETITIONS

1. **Proper Court.** The petitioner should, as with extraordinary writs, start with the lowest available court.

2. **Timeliness.** Habeas should of course be sought promptly but it is safe to generalize that if custody and the condition complained of persist at the time the petition is filed the fact that the petition should have been filed sooner will not be very important. (However, read In re Clark (1993) 5 Cal.4th 750.)

3. **Form.** Printed Judicial Council forms are available and should be used for in-custody habeas corpus petitions (rule 56.5). Otherwise general rules apply.

4. **Record.** Often (in the nature of habeas) the relevant facts have not previously been recorded: Part of the relief sought in such cases will be a hearing at which more evidence can be taken. But the petitioner must present, by verified statement and such record as he or she can marshal, a factual case sufficient to make a prima facie case for relief. (See generally In re Hochberg (1970) 2 Cal.3d 870, and In re Lawler (1979) 23 Cal.3d 190, 194.) Many habeas petitions are denied for failure to make a prima facie case at the outset.

5. **Points and authorities.** Counsel should of course submit well-crafted points and authorities in support of a habeas petition. The waiver of points and authorities for in-custody habeas petitions (in rule 56.5) should be understood to extend only to pro se petitioners. It is customary for attorneys filing petitions for indigent petitioners to request appointment at the same time as filing the petition for writ of habeas corpus.

6. **Repeat applications.** Denial of habeas corpus is not appealable; the orthodox route to further review is to file a new habeas corpus petition in a higher court. (See In re Reed (1983) 33 Cal.3d 914, 918, fn. 2.) But in general habeas may not be used to renew contentions made and rejected in an earlier appeal. (In re Waltreus (1965) 62 Cal.2d 218, 225; In re Winchester (1960) 53 Cal.2d 528, 532.)

## PROCESSING THE HABEAS PETITION

1. **Opposition.** If the habeas corpus petition makes a prima facie case for relief the order to show cause should issue. But it is common for reviewing courts to ask opposing counsel (often the Attorney General) to furnish an informal response. The petitioner must be given an opportunity to reply (rule 60).

2. **Order to show cause.** Habeas may be summarily denied. If relief is to be granted the normal first order is an order to show cause, directed to the custodial

authority and made returnable before a specified court at a specified time. Often a reviewing court will make the order returnable before a lower court better equipped to deal with apparent evidentiary issues.

3. **Stays.** It is possible for a reviewing court, upon an appropriate showing, to issue temporary stays pending determination of a habeas petition.

4. **Return.** The habeas order to show cause initiates a relatively structured exchange of pleadings: The party ordered to show cause is expected to file a “return” to the writ which is in the nature of a pleading to justify the responding party’s position with respect to the petitioner’s allegations. Normally the return will also be accompanied by factual materials. The petitioner will then be expected to file a “traverse” to the return, analogous to the answer in civil pleading. (See In re Lawler (1979) 23 Cal.3d 190, 194.)

5. **Hearing.** Depending on the nature of the issue joined by return and traverse, the court may order evidentiary hearings (before itself, a lower court, or a referee or master) or proceed directly to oral argument on points of law. Submission, decision, and review will be orthodox, except that an unsuccessful petitioner will sometimes choose to file a new habeas petition (rather than a petition for review) in the Supreme Court.

## OTHER ORIGINAL PROCEEDINGS

Other original proceedings are thoroughly documented elsewhere or are so arcane as to be beyond the scope of this outline or so rare as to be unlikely to turn up in practice. A partial list:

**Certiorari** is rarely used in its common-law form except to review contempt adjudications. It lies to review a nonappealable completed judicial act in excess of jurisdiction. Procedurally certiorari differs markedly from mandate and prohibition: The writ of certiorari issues not to grant relief but simply to call up the relevant lower-court record, which will then be reviewed upon such procedures as the reviewing court may specify. (See generally Cont.Ed.Bar, Cal. Civil Writ Practice (3rd ed. 1996) §§ 4.77, 1.1, 1.5, 10.13, 3.50-3.54.)

Statutory review of **Workers’ Compensation Appeals Board** matters is a subset of a highly developed, highly specialized field of practice with a substantial literature of its own. Begin with Cont.Ed.Bar, Cal. Workers’ Compensation Practice (3d ed. 1985), which points to several other workers’ compensation texts and to the special reporters.

Other statutory review proceedings are similarly highly specialized although not nearly as well documented. **Agricultural Labor Relations Board** matters are for the most part handled by a small group of expert practitioners. One significant ALRB

decision is Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal.3d 335. Public Employment Relations Board and Alcoholic Beverage Control matters rarely reach the reviewing courts. For a highly specialized example of a statutory provision for a writ of review see Gov. Code, § 6259, subd.(c).

**Coram vobis** is a rare, limited, and technical writ occasionally sought in criminal matters and even more rarely in civil matters. (See Cont.Ed.Bar, Appeals and Writs in Criminal Cases (1982) §§ 2.149-2.180, pp. 369-384; Cont.Ed.Bar, Cal. Civil Writ Practice (3rd ed. 1996) § 4.113-.114.)

**Quo warranto** is theoretically available but almost never sought. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, §§ 7-10, pp. 787-791; Cont.Ed.Bar, Cal. Civil Writ Practice (3rd ed. 1996) §§ 4.101-4.110.) Other writs with even stranger names are probably out there to be had, but the Sixth District has not yet encountered them.

Note that “administrative mandamus” (Code Civ. Proc., § 1094.5) is a trial court phenomenon: Reviewing courts will normally see such matters on appeal rather than by writ petition. See Cont.Ed.Bar, Cal. Administrative Mandamus (2d ed. 1989), as supplemented.

## RELIEF ANCILLARY TO APPEAL

Here are a few of the special forms of relief ancillary to appeal which are handled specially in the Sixth District:

**Stays pending appeal** under Code Civ. Proc., § 923 (including the traditional “writ of supersedeas”) are thoroughly discussed in chapter 6 of Cont.Ed.Bar, Cal. Civil Appellate Practice (2d ed. 1985). Two important cases are People ex rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal.2d 533, 538, and Mills v. County of Trinity (1979) 98 Cal.App.3d 859, 861. There are a few other specialized statutory provisions for stays. (E.g., Pen. Code, § 1506, Code Civ. Proc., § 1094.5, subd. (g), id. § 1176.)

**Bail pending appeal** in criminal matters is normally applied for and handled in the trial court. (Cf. Pen. Code, §§ 1272-1272.1; rule 32; Cont.Ed.Bar, Appeals and Writs in Criminal Cases (Supp. 1998) § 1.15A, p. 21, et seq.) The Court of Appeal’s concern will be primarily to assure that the trial court has exercised its discretion.

**Appellate department transfers** are considered under Code Civ. Proc., § 911 and rules 61 et seq. Under the Rules of Court transfer may be ordered only where the appellate department has either published its opinion or certified the opinion for transfer. The Court of Appeal has “uncontrolled discretion” to grant or deny transfer. (Dvorin v. Appellate Dept. (1975) 15 Cal.3d 648, 650.) In general, transfer will be ordered only if the Court of Appeal intends to publish its ensuing opinion. Applications for “transfer” by extraordinary writ, where the appellate department has neither published nor certified its opinion, are occasionally filed but rarely granted.



## **CALIFORNIA RULES OF COURT, RULE 56. ORIGINAL PROCEEDINGS**

**(A) [Form and content of petition]** A petition to a reviewing court for a writ of mandate, certiorari, or prohibition, or for any other writ within its original jurisdiction, must be verified and shall set forth the matters required by law to support the petition, and also the following: (1) If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court; (2) if any judge, court, board, or other officer or tribunal in the discharge of duties of a public character be named therein as respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding; and (3) if the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the title of the petition shall include the notation “Related Appeal Pending,” and the first paragraph shall set forth: (i) the title, superior court docket number, and appellate court docket number, if any, of the pending appeal, and (ii) if the petition is brought pursuant to Penal Code section 1238.5, the date of filing of the notice of appeal.

The cover of the petition shall contain the title of the case, the name, address, and telephone number of the attorney filing the petition, the name of the trial judge, and the number of the case in the trial court, if any. The cover shall also contain the California State Bar membership number of the attorney filing the petition and of every attorney who joins in the petition. California State Bar membership numbers of the supervisors in a law firm or public law office of the attorney responsible for the case need not be stated.

Until July 1, 1994, a petition shall not be rejected for filing because the attorney’s California State Bar membership number does not appear on the cover, but it may be stricken if the attorney does not furnish the number promptly upon request by the clerk.

**(b) [Points and authorities and service]** A petition for the issuance of such a writ shall be accompanied by points and authorities and by proof of service of both on the respondent and any real party in interest named in the petition. The proof of service shall name each party represented by each attorney served; a petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction. No statement in opposition to the petition is required unless requested by the court, but within five days after service and filing, the respondent or any real party in interest or both, separately or jointly, may serve and file points and authorities in opposition and a statement of any fact considered material not included in the petition. The court in its discretion (1) may allow the filing of the petition without service, and (2) may deny the petition or issue an alternative writ without first requesting the filing of opposition.

(c) **[Supporting Documents]** A petition for a writ that seeks review of a trial court ruling shall be accompanied by a record adequate to permit review of the ruling, including:

(1) a copy of the order or judgment from which relief is sought;

(2) copies of all documents and exhibits submitted to the trial court supporting and opposing petitioner's position;

(3) copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling;

(4) a transcript of the proceedings leading to the order or judgment below or, if a transcript is unavailable, a declaration by counsel (i) explaining why a transcript is unavailable and (ii) fairly summarizing the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated; or a declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which shall be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record. A full summary of the oral proceedings may be omitted if part of the relief sought is an order requiring preparation of transcript for the use of an indigent criminal defendant in support of the writ petition, and counsel's declaration demonstrates the petitioner's need for and entitlement to the transcript.

All copies of documents shall be legible.

A petitioner who requests an immediate stay shall explain in the petition the reasons for the urgency and set forth all relevant time constraints.

In exigent circumstances, a petition may be filed without the documents required by (1),(2), and (3) if a declaration by counsel explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance.

If a petitioner does not submit the required record and explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny the stay request, the petition, or both.

(d) **[Supporting documents - tabbed, paginated, and listed]** Documents submitted in support of the petition shall (1) be bound together at the end of the petition or in a separate volume, (2) be index-tabbed by number or letter, with each exhibit consecutively paginated, and (3) begin with a table of contents listing each document by title and index-tab number or letter.

The clerk shall accept for filing petitions and supporting documents not in compliance with this subdivision; but the court may give the petitioner notice requiring that the petition and documents be brought into compliance within a stated reasonable time, or the petition may be stricken or denied summarily.

**(e) [Return]** If the petition is granted, with or without prior service or opposition, and a writ or order to show cause issues, the respondent or real party in interest or both, separately or jointly, may make a return, by demurrer, verified answer or both. Unless a different return date is specified by the court, the return shall be made at least five days before the date set for hearing. If the return is by demurrer alone, and the demurrer is not sustained, the peremptory writ may issue without leave to answer.

**(f) [Notice to trial court]** If a writ or order issues directed to any judge, court, board, or other officer or tribunal, the clerk of the reviewing court shall promptly transmit a certified copy of the writ or order to the court, board, tribunal or person to whom it is addressed.

If the writ or order stays or prohibits proceedings scheduled to occur within seven days of its issuance, or if the writ or order requires that action be taken by the respondent within seven days, or in any other urgent situation, the clerk of the reviewing court shall make a reasonable effort to give telephone notice to the clerk of the court or tribunal below, who shall notify the judge or other officer most directly concerned. Telephone notice of the summary denial of a writ is not required, whether or not a stay was previously issued.

**(g) [Proceedings not covered by this rule]** The provisions of this rule shall not apply to applications for a writ of habeas corpus, or to petitions for review pursuant to rules 57, 58 and 59.

**(h) [Time to file a Responsive Pleading Under Code of Civil Procedure Section 418.10]** If a petition for review is filed in the Supreme Court after the Court of Appeal denies a writ of mandate, the time for filing a responsive pleading in the trial court under Code of Civil Procedure section 418.10(c) is extended until 10 days after the Supreme Court files its order denying the petition.

As amended, eff. Jan. 1, 1951; Jan. 1, 1959; July 1, 1964; July 1, 1976; July 1, 1980; Jan. 1, 1983; Jan. 1, 1984; July 1, 1985; Jan. 1, 1988; Aug. 1, 1993; Jan. 1, 1997.

Revised 8/99